IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

APPEAL (LDG) NO.803 OF 2007
IN
NOTICE OF MOTION NO.3551 OF 2007
IN
ADMIRALTY SUIT NO.37 OF 2007

Tropical Forestries Pte Ltd.
a Company incorporated under the
laws of Singapore and having its
office at 51 Anson Road, #02-63,
Anson Centre, Sigapore 079904. ...Appellant.
(Ori.Plaintiff)

Vs.

m.v. PACIFIC NOVAGTOR,
a foreign flag vessel, flying a
Cambodian flag and presently
in port and harbour Kandla,
together with her hull, tackle,
machinery, apparel and other
paraphernalia. ...Respondent.
(Ori.Defendant)

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Mr.U. V. Shetty i/b. Mr. R. A. Fernandes for the Appellant.
Mr. P. S. Pratap for the Respondent.

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CORAM : SWATANTER KUMAR, C.J. &
DR.D.Y.CHANDRACHUD, J.

October 19, 2007.

JUDGMENT (PER DR. D.Y. CHANDRACHUD, J.) :

An order for the arrest of a vessel was passed by the Learned Single Judge on 17th August 2007. The Defendant took out a

Notice of Motion for vacating the order of arrest and for a direction that the Plaintiff deposit or furnish security in the amount of U.S. $384,800. The Learned Single Judge, by an order dated 8th October 2007, directed the Defendant to furnish security in the amount of U.S. $558,240 to the satisfaction of the Prothonotary & Senior Master, upon which the vessel was permitted to sail. The Plaintiff was directed to furnish security in the sum of U.S. $250,000 by 15th October 2007 failing which, the vessel would be allowed to sail unconditionally. The Plaintiff is in appeal against the order of the Learned Single Judge to the extent to which the Court has directed the Plaintiff to submit a counter security in the amount of U.S. $250,000.

2. On behalf of the Plaintiff, it has been submitted that there was no basis for the Learned Single Judge to direct the Plaintiff to furnish security and there was no material on record that would suggest that the order of arrest was obtained wrongfully or in a malicious manner. It is submitted that the Learned Single Judge having come to the conclusion that the Plaintiff's case for seeking

arrest of the vessel was not ex-facie without foundation, the Court ought not to have directed the Plaintiff-Appellant to furnish security. It is urged that the vessel was not in a position to sail because her engines were not functioning. The amount of security, it was submitted, is excessive. On behalf of the Respondent-Defendant, it has been submitted that (i) The Plaintiff has no prima facie case; (ii) The Learned Single Judge had the jurisdiction to direct the Plaintiff to furnish the security; and (iii) The vessel was detained from 22nd August 2007 for a period of 55 days, causing loss of over U.S. $800,000. Even applying the rate of demurrage under the charter party, the loss was over U.S. $500,000. The Learned Single Judge, it was submitted, directed that security in a reasonable amount of U.S. $250,000 may be furnished.

3. At the outset, it would be necessary to observe that in view of the law laid down by the Supreme Court in **M.V.Elisabeth vs. Harwan Investment and Trading**,[1] the Learned Single Judge did have jurisdiction to direct the Plaintiff to furnish security to compensate the Defendant in the event of the arrest being found to

1 1993 Supp(2) SCC 433

be wrongful or having been obtained maliciously or in bad faith. The Supreme Court observed thus:

> "48. A ship may be arrested (i) to acquire jurisdiction; or (ii) to obtain security for satisfaction of the claim when decreed; or (iii) in execution of security being furnished by the plaintiff to compensate the defendant in the event of it being found that the arrest was wrongful and was sought and obtained maliciously or in bad faith. The claimant is liable in damages for wrongful arrest. This practice of insisting upon security being furnished by the party seeking arrest of the ship is followed in the United States, Japan and other countries. The reason for the rule is that a wrongful arrest can cause irreparable loss and damages to the shipowner; and he should in that event be compensated by the arresting party (see Arrest of Ships by Hill, Sochring, Hosoi and Helmer, 1985)."
> (paragraph 48 at page 53).

Article 6 of the International Convention on Arrest of Ships, 1999, does recognize such a power in the Court:

> "1. The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:
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> (a) the arrest having been wrongful or unjustified; or

(b) excessive security having been demanded and provided."

The jurisdiction in Admiralty to direct the Plaintiff to furnish security cannot be doubted.

4. On behalf of the Respondent, it has been urged that the Appellant is a Foreign Trading Company with no assets in India and has filed an undertaking of a local constituted attorney who is not even an employee. The Respondent has claimed that it has suffered a substantial loss as a result of the arrest. The claim of the Appellant is according to the Respondent ex-facie without foundation. The vessel, it was urged, was ready to sail after completion of discharge and is ready to sail even at the present point of time. However, as a result of the prolonged detention of the vessel, the Respondent claims to have carried out certain repairs over a few days which would otherwise not have been carried out at Kandla where facilities were inadequate and spares were unavailable. According to the Respondent, the detention of the vessel for a period of 55 days since

22nd August 2007 has resulted in a loss of U.S. $800,000.

5. The order of the Learned Single Judge is reasonable, just and proper. The Learned Single Judge has recorded the rival contentions of the parities originating in the application filed by the Defendant for vacating the order of arrest. The Learned Single Judge was of the view that the submissions of the Defendant in regard to the speculative nature of the claim of the Plaintiff bear upon the merits of the controversy which cannot be decided finally at the present stage. Evidence is still to be adduced at the trial of the suit. This is not a case of the genre where there is no material on record to sustain the claim. Hence, the order of arrest could not be vacated without calling upon the Defendant to furnish security. However, the Learned Single Judge has adverted to the averments contained in paragraph 9 of the affidavit in support of the Notice of Motion and the reply thereto and came to the conclusion that it is appropriate if the Plaintiff is also directed to furnish security in the sum of U.S. $250,000. In holding thus, the Learned Single Judge noted that prima facie that at this stage, the Plaintiff is not able to substantiate its claim in respect of

other losses and considering that the cargo was disposed of by the original buyer to a third party, the Plaintiff must undertake to secure the claim of the Defendant. The delay involved and the non-submission of the Survey Report were additional circumstances which have weighed with the Learned Single Judge. As we have noted earlier, the Learned Single Judge did have the jurisdiction to direct the Plaintiff to furnish security. That is in accord with the position of law laid down by the Supreme Court in **Elisabeth** (supra). The evaluation of the circumstances in which the Learned Single Judge was of the view that a direction as regards furnishing of security by the Plaintiff should be issued and the quantum of security cannot be faulted. The quantum of security which has been directed to be furnished cannot be regarded as excessive.

6. In the circumstances, we do not find any merit in the appeal. The appeal shall stand dismissed. We, however, extend time for the Plaintiff to furnish security by a further period of one week from today. In the event that the Plaintiff fails to do so, the consequences envisaged in the order of the Learned Single Judge shall follow.

CHIEF JUSTICE

Dr.D.Y. CHANDRACHUD, J.